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Brian Nishitani, Esquire (3RC44)
USEPA Region III
1650 Arch Street
Philadelphia, PA 19103

Re Lower Darby Creek Area Superfund Site

Dear Brian

On the joint behalf of Waste Management, Inc ("WMI") and Browning-Ferris Industries, Inc ("BFI"), I am writing to respond to EPA's recent suggestion in the above-referenced matter that it is considering discontinuance of its longstanding practice of involving counsel for WMI and BFI in interviews of former employees of WMI and BFI, and/or former employees of hauling companies to which WMI or BFI are alleged to be the successor. Any change to EPA's practice in this regard would present serious concerns for WMI and BFI, and would run counter to years of well-established policy at numerous sites in Region III and elsewhere.

As you have noted, Pennsylvania law (as it is discussed in the ABA Section of Litigation, Environmental Litigation Committee's Monograph entitled "Ex Parte Contacts With Former Employees") may not prohibit EPA from contacting and interviewing unrepresented non-managerial former employees without involving counsel for WMI and/or BFI. Despite this, WMI's and BFI's long history of working cooperatively with EPA on former employee interviews consistently has shown that there are many advantages, and no perceptible disadvantages, to involving counsel in the process.

First, WMI and BFI counsel regularly have assisted in maximizing the efficiency of the interview process by locating, contacting and arranging interview dates for former employees. Our active role in facilitating these interviews has helped us to gain the trust of the witnesses, which we believe has encouraged many of them to be more cooperative than they might otherwise have been.

Second, counsel's participation in the process consistently has served to maximize the quality, quantity and reliability of the information provided by former employees. Our discussions with witnesses in preparation for their interviews, and our participation in the interviews themselves, have often helped prepare the witnesses to answer questions from EPA's

interviews more candidly and completely. Indeed, we cannot recall any instance in which our involvement in the process has inhibited the cooperativeness of a former employee interviewed by EPA.

Third, at the Lower Darby Creek Area Site, like many others, WMI and BFI are alleged to be liable as successors through acquisitions of hauling companies. In such situations, questions of corporate history and corporate acquisitions often arise in interviews of former employees of these hauling companies. We often have seen former employees provide erroneous or confusing information on these important issues in their interviews. When counsel for WMI and/or BFI are involved in the process, incorrect information can be corrected, clarified and/or confirmed promptly, before any additional resources are consumed by EPA in further investigation of inaccurate information.

Finally, counsel's active participation in the former employee interview process facilitates EPA's PRP investigation efforts by enabling us to undertake many forms of follow-up investigation much more efficiently and effectively. It is far more difficult for us to be helpful if counsel does not learn about a former employee's interview until after it occurs, or if counsel must await EPA's release of an interview summary, which can significantly delay our ability to undertake further investigative efforts based on information provided in the interview.

In short, we respectfully submit that the benefits of involving counsel for WMI and BFI in former employee interviews far outweigh any perceived disadvantages. A positive and cooperative working relationship between us in the former employee interview process historically has yielded the best results for all concerned, in terms of efficient discovery of reliable PRP information and expansion of the universe of PRPs at a given site.

WMI and BFI urge you to give careful consideration to this important issue, and to continue to involve counsel for WMI and BFI in the interviews that EPA may wish to conduct of their former employees. We would be happy to discuss these matters further with you at your convenience.

Sincerely yours,


Joseph F. O'Dea, Jr.

cc Jeffrey N. Martin, Esquire
Counsel for BFI